

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS RIZZUTO,

Plaintiff/Counter-Defendant/Appellant,

v

SUSAN RIZZUTO,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED

March 30, 1999

No. 201842

Wayne Circuit Court

LC No. 96-600516 DO

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm.

The litigants were married in 1974. The only child born during the marriage, Karyn, was twenty-one years old at the time of trial. Both litigants possessed high school educations. Defendant remained home after the birth of Karyn and was never employed outside of the home prior to the divorce action. However, at the time of trial, defendant was employed as a receptionist working approximately thirty hours per week at a pay rate of \$7.00 per hour. Plaintiff obtained his builder's license in 1995 and held certifications as a master plumber and a pipefitter. At the time of trial plaintiff was employed as a pipefitter in the maintenance department of Peregrine, formerly a division of General Motors. Plaintiff began employment with General Motors in 1984. He earned approximately \$52,000.00 in 1996 from his employment with Peregrine. In addition, Plaintiff operated a part-time business known as "The Plumber." The value of this business is a critical issue in this appeal.

Trial commenced on January 27, 1997. The court took testimony from both litigants and defendant's expert, Richard Pagac, a certified public accountant who offered expert testimony on the value of plaintiff's part-time business. The trial continued on January 28, 1997, however, plaintiff was not present on this day. The court took testimony from defendant and declined to continue trial to allow plaintiff to testify as a rebuttal witness. Plaintiff did not offer any expert testimony to address the value of his part-time business.

In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. *Draggo v Draggo*, 223

Mich App 415, 429; 566 NW2d 642 (1997). If the findings of fact are upheld, this Court must determine if the dispositive ruling is fair and equitable in light of the fact finding. *Id.* In reaching its factual findings the trial court relied upon the opinion of defendant's accounting expert witness as to the valuation of plaintiff's part-time plumbing business. Plaintiff contends that the trial court erred in this regard because the expert's opinion was based upon speculation and conjecture. Plaintiff argues the court's reliance upon speculative testimony as to the value of "The Plumber," resulted in an inequitable and unjust property division. We disagree.

A trial court's decision to admit expert testimony or exclude it as speculative is reviewed for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). Prior to admission of testimony, the trial court must determine the trustworthiness of the facts and data underlying the expert's opinion. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997). When determining the value of plaintiff's business, defendant's expert relied, in part, upon the amount of money deposited into the business account over a two year period. Plaintiff contends that because income from other sources, independent of his plumbing business, was deposited into the account, the opinion of defendant's expert was unreliable and should not have been relied upon by the trial court. Plaintiff, however, failed to present any documentation to substantiate his claims. Moreover, a review of the testimony reveals that defendant's expert did not merely assume that all the cash deposited into the account was from plumbing work. The expert considered plaintiff's salary from his full-time employment, rental income from other properties, plaintiff's cash payment of plumbing supply invoices and deposits into the business account, then applied accepted accounting and IRS principles, to calculate how much income plaintiff's part-time business had generated. He then used this figure to determine the value of the business.

We find that the opinion of defendant's expert was not based upon pure speculation and conjecture. The expert's opinion was based upon data derived from the application of accepted accounting and IRS principles to the accounting records made available to defendant. Plaintiff failed to present documentary evidence or expert testimony to contradict the opinion of defendant's expert. Given these facts we cannot conclude that the trial court abused its discretion by admitting the expert testimony. Further, because the trial court's findings of fact regarding the value of "The Plumber" were based upon properly admitted expert testimony, we will not conclude that the court's factual findings in this regard were clearly erroneous.

Plaintiff also contends that the trial court erred in awarding alimony. We disagree. In *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996), this Court discussed the propriety of an alimony award:

A divorce court has the discretion to award alimony as it considers just and reasonable. Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. [Citations omitted.]

Defendant was married to plaintiff for twenty-two years and had a child shortly after the completion of high school. While only in her early forties, defendant's work experience was limited to homemaker pursuant to her agreement with plaintiff that she would remain home to take care of their child. While defendant's health is such that she is capable of working, her lack of higher education and job skills impairs her ability to earn a substantial income. Additionally, the trial court expressly found plaintiff at fault for the breakdown of the marital relationship. Considering these factors, this Court cannot find that the trial court abused its discretion by entering an award of non-modifiable alimony for a six year period.

Plaintiff also argues the amount of alimony is excessive since the trial court based its decision upon the erroneous conclusion that plaintiff's part-time plumbing business generated substantial income. Since we find no error in the trial court's admission and adoption of the opinions of defendant's expert, we do not find the amount of alimony awarded by the trial court to be excessive.

Plaintiff also objects to the award of attorney fees to defendant. In a divorce proceeding, an attorney fee award rests within the discretion of the trial judge. "This Court will not reverse the grant or denial of attorney fees absent a manifest abuse of discretion." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The trial court did not abuse its discretion in awarding attorney fees to defendant. In *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995), this Court set forth the following considerations when determining whether an award of attorney fees is necessary:

Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion. Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. [Citations omitted.]

In the instant case, defendant testified that she was unable to pay her attorney fees as cash was unavailable to her. Therefore, she borrowed money from family members to proceed with this litigation. The record supports the conclusion that defendant would have to invade her support assets in order to pay her attorney fees. Under the circumstances, we hold that the trial court's award was not an abuse of discretion. *Hanaway*, *supra* at 298.

Finally, defendant claims that plaintiff's appeal is frivolous and, consequently, defendant should be awarded \$7,500 in attorneys fees incurred on appeal. Defendant cites no case or court rule defining what constitutes a frivolous appeal. We are therefore guided by MCR 2.114.

We do not find that plaintiff's arguments are so legally baseless as to be deemed frivolous and advanced in bad faith. Nor do we find any facts upon which we might conclude that this appeal was taken for an improper purpose. Accordingly, we decline to award to plaintiff her attorney fees incurred as a result of this appeal.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra